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No. 03-407

Supreme Court, U.S.
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In the
Supreme Court of the United States

JUDGE JOHN F. KOWALSKI,
JUDGE WILLIAM A CRANE, And
JUDGE LYNDA L. HEATHSCOTT,

Petitioners,

JUDGE DENNIS C. KOLENDA,

Respondent

v

JOHN CLIFFORD TESMER, CHARLES CARTER,
ALOIS SCHNELL, ARTHUR M. FITZGERALD, And
MICHAEL D. VOGLER,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

The Michigan Constitution, Mich Const 1963, art I, § 20, provides that a criminal defendant who pleads guilty shall not have an appeal of right and shall have a right to appointed appellate counsel "as provided by law." A Michigan statute, Michigan Compiled Law (MCL) 770.3a, provides, with significant listed exceptions, that a criminal defendant who pleads guilty shall not have appointed appellate counsel for discretionary appeals for review of the defendant's conviction or sentence.

I. Do attorneys have third-party standing on behalf of potential future indigent criminal defendants to make a constitutional challenge to a state statute prohibiting appointment of appellate counsel in discretionary first appeals following convictions by guilty pleas where the federal courts properly abstained from hearing the claims of indigent criminal defendants themselves?

II. Does the Fourteenth Amendment guarantee a right to an appointed appellate attorney in a discretionary first appeal of an indigent criminal defendant convicted by a guilty plea?

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INTRODUCTION

1. The concept of third-party standing is elastic, but it should not be stretched so thin as to grant attorneys an open-ended right to eschew actual clients with rights at stake in concrete controversies and instead litigate speculative constitutional claims on behalf of potential future clients. Respondent Attorneys could have represented actual criminal defendants who would be subject to the Michigan statutory provisions concerning appointed counsel on appeals from guilty plea convictions. Their clients could have brought their challenge in direct appeals in the Michigan courts, and could then have sought collateral review in the federal courts by way of habeas corpus. Instead, in the absence of clients and a factual context, Respondent Attorneys chose a litigation strategy of evading the Michigan appellate courts and evading the federal habeas corpus courts. They brought a facial challenge in a federal court before the statute even took effect, seeking declaratory and injunctive relief against Michigan trial judges. They do not assert that *they* have any constitutional rights at stake but they assert the broad right to litigate rights of future clients they might someday represent.

2. Appointed appellate counsel is constitutionally required only if a first appeal is decided on the merits of the issues presented. *Douglas v California*, 372 US 353 (1963). That is because such an appeal is "an integral part of the . . . trial system for finally adjudicating the guilt or innocence of a defendant." *Griffin v Illinois*, 351 US 12, 18 (1956). In contrast, the Constitution does not require appointed appellate counsel for an application for leave to appeal, particularly from a guilty plea conviction, to an intermediate State appellate court when the only question is whether the appellate court will exercise its discretion and accept the appeal. In such a system, "[t]he critical issue . . . is not whether there has been 'a correct adjudication of guilt' in every individual case." *Ross v Moffitt*, 417 US 600, 615 (1974) (citing *Griffin*).

Respondent Attorneys' arguments are based on the mistaken premise that Michigan's discretionary applications for leave to appeal from guilty plea convictions are appeals on the merits of the underlying legal issues. They are not. Respondent Attorneys refuse to acknowledge binding Michigan precedent holding that applications for leave to appeal do not invoke the appellate court's plenary jurisdiction and that orders denying such applications are simply determinations not to accept the appeal; they are not decisions on the merits of the underlying legal issues. If such an application is accepted and an appeal on the merits is granted, the Michigan statute requires appointment of appellate counsel. Because orders of the Michigan Court of Appeals denying applications for leave to appeal are not decisions on the merits, the application process is analogous to the discretionary appeals in *Ross* and not the appeals on the merits as in *Douglas*. There is no constitutional right to an appointed appellate counsel for such discretionary applications.

3. The problematic nature of Respondent Attorneys' lawsuit is highlighted by the fact that they have brought a facial challenge to the entire Michigan statute. They cannot prevail unless they "establish that no set of circumstances exists under which the Act would be valid." *United States v Salerno*, 481 US 739, 745 (1987). They cannot meet that requirement, since the statute contains explicit provisions mandating appointment of appellate counsel in certain circumstances, MCL 770.3a(2)(a)-(d), and permitting it in others, MCL 770.3a(3)(a)-(c). An actual criminal defendant who pleaded guilty and then was denied appointed appellate counsel could properly allege that the statute was unconstitutional *as applied to him*. The premature and abstract nature of the challenge brought by Respondent Attorneys precludes the existence of any such injury in fact, and as demonstrated in Petitioner Judges' brief, adjudication in such circumstances is inappropriate. This Court recently reiterated that "facial challenges are best when infrequent." *Sabri v United States*,

541 US ___; 124 S Ct 1941, 1948; 158 L Ed 2d 891 (2004). There a criminal defendant sought to bring an overbreadth challenge to a criminal statute, alleging that it could not be applied to him because it could not be applied to others. In language appropriate to the present case, the Court observed that such facial challenges "invite judgments on fact-poor records," "call for relaxing familiar requirements of standing," and seek "a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand." *Id.*

ARGUMENT

I. The Respondent Attorneys Do Not Have Standing.

A. The Issue Of The Respondent Attorneys' Standing Was Raised, Preserved, And Decided In Every Court Below, And Is Properly Before This Court.

Respondent Attorneys' assertion that Petitioner Judges did not challenge, and therefore waived, the issue of Respondent Attorneys' standing is simply incorrect. Beginning with the motion to dismiss (filed three weeks after the complaint), the brief in support of the motion, and the reply brief filed in the District Court, and continuing with the brief, the reply brief and the supplemental brief on rehearing filed in the Court of Appeals, Petitioner Judges raised and preserved their challenge to the Respondent Attorneys' standing. The District Court, the three-judge panel in the Court of Appeals, and the *en banc* Court of Appeals all considered the issue sufficiently presented, all carefully addressed it, and all decided it.

Respondent Attorneys assert that Petitioner Judges did not sufficiently discuss all three "requirements" of the doctrine of *jus tertii* standing, but in addition to being wrong, their arguments are misplaced. What they describe as "requirements" are not hard-and-fast prerequisites, all of which must be met; they are simply examples of the type of prudential considerations the Court has examined in determining whether to permit an entity to litigate a particular claim. See *Elk Grove Unified School District v Newdow,* 542 US ___; 2004 US LEXIS 4178; 72 USLW 4457; slip opinion at 8 (2004)("we have not exhaustively defined the prudential dimensions of the standing doctrine"). Compare, for example, the different formulations of the "factors" in *Caplin & Drysdale, Chartered v United States*, 491 US 617, 624 n 3 (1989) and the "criteria" in *Powers v Ohio*, 499 US 400, 410-

411 (1991). In *Caplin & Drysdale,* the Court even permitted *jus tertii* standing where not all of the factors were met ("The second of these three factors counsels against review here . . . We think the first and third factors, however, clearly weigh in petitioner's favor. . . . Petitioner therefore satisfies our requirements for *jus tertii* standing." 491 US at 624, n 3.).

Petitioner Judges' arguments concerning Respondent Attorneys' standing focused on their lack of direct personal stake in the controversy, a core aspect of the case or controversy requirement of US Const, Art III that cannot be waived. Fed R Civ P 12(h)(3); *Jenkins v McKeithen*, 395 US 411, 421 (1969)("since the question of standing goes to this Court's jurisdiction, . . . we must decide the issue even though the court below passed over it without comment."); *FW/PBS, Inc v City of Dallas*, 493 US 215, 230-231 (1990) ("Although neither side raises the issue here, we are required to address the issue even if the courts below have not passed on it, . . . and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'")(Citation omitted).

Petitioner Judges also discussed prudential limitations on the exercise of judicial power and presented arguments that there was no client relationship and that indigent defendants were able to present their own claims in their own appeals. See, e.g., District Court brief, pp 11-12; District Court reply brief, pp 2-3, 3-4; Court of Appeals brief pp 28-29, 32-33.

Most importantly however, the lower courts believed the issue of the Respondent Attorneys' standing was sufficiently presented, and they discussed the issue in detail and decided it on the merits. See District Court opinion, Pet App 93a-100a; Court of Appeals panel opinion, Pet App 73a-77a; Court of Appeals *en banc* opinion 10-19a. There can be no waiver of an issue that was explicitly decided below. *Cf. Orr v Orr*, 440 US

268, 274-275 (US, 1979)(where state courts expressly decided a federal law issue, objection that the issue was not preserved was "untenable," and Court applied "the 'elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided.' *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914).").

This is not a situation like *Craig v Boren*, 491 US 617, 193-194 (1976) where the government never raised the question of standing. Nor is it like *Muhammad v Close*, 540 US ___; 124 S Ct 1303, 1306-1307; 124 L Ed 2d 32, 38 (2004) where this Court held that the government could not raise a claim in this Court because it "failed to raise the claim [in the District Court and Court of Appeals] when its legal and factual premises could have been litigated."

Respondent Attorneys state in passing that this case is one in which the question of standing is "inextricably intertwined" with the merits, so apparently even if they do not have standing, it "would not have been error" for the Court of Appeals to decide the merits of the constitutional issue. Brief, 17, n 5, citing *City of Revere v Massachusetts General Hospital,* 463 US 239, 243 (1983). In *Revere*, this Court, after noting that the hospital had its own Article III standing but that the prudential reasons for giving it standing to assert the rights of third parties were weak, concluded that it "could not resolve the question whether [the hospital] has third-party standing without addressing the constitutional issue" and that if it found a lack of standing the result would be to dismiss the petition for certiorari. *Id*, at 243, n 5 and accompanying text.

In the present case, however, the third-party standing claim of the Respondent Attorneys is completely independent of the constitutional question of the right of indigent defendant to appointed appellate counsel in discretionary appeals. The case can be resolved by reversing the Court of Appeals on the

standing question, reversing its judgment, and remanding with instructions to dismiss the complaint. See *Newdow, supra*, slip opinion at 7-8, where the Court of Appeals had decided a standing issue and a constitutional issue, but this Court, noting the "'deeply rooted' commitment 'not to pass on questions of constitutionality'" unless necessary, reversed on the standing issue, reversed the judgment, and did not reach the constitutional issue: "Even in cases concededly within our jurisdiction under Article III, we abide by 'a series of rules under which [we have] avoided passing upon a large part of all the constitutional questions pressed upon [us] for decision.'" (Internal citations omitted.)

The issue of the Respondent Attorneys' standing was timely raised, properly preserved, and explicitly decided below. It is properly before this Court for decision, independent of the issue of the asserted right to appointed appellate counsel.

B. Respondent Attorneys Have Not Suffered An "Injury In Fact."

Contrary to Respondent Attorneys' characterization, Brief p 17, Petitioner Judges do not claim that special rules of standing apply to attorneys. Petitioner Judges do not assert that attorneys can never have standing or that potential economic harm is never enough to confer standing. Petitioner Judges only assert that when individuals subject to a new state statute have adequate opportunity to challenge it themselves they should do so. Attorneys as to whom the statute does not directly apply and who have no present clients do not have independent standing to bring a facial challenge to the statute simply by asserting that potential future clients might be subject to the statute and that the attorneys' future income might be affected.

Petitioner Judges' brief demonstrates that Respondent Attorneys have not suffered any "injury in fact," *Lujan v*

Defenders of Wildlife, 504 US 555, 560 (1992), and nothing in the Attorneys' brief demonstrates the contrary. They cite *FW/PBS, Inc v City of Dallas*, *supra*, 493 US 215, for the proposition that a loss of income is sufficient to establish standing, but the decision does not say that. There a city ordinance defined motels that rent rooms for less than 10 hours as sexually oriented businesses subject to regulation. Motel owners alleged, among other things, that the 10-hour limitation placed an unconstitutional burden on the right to freedom of association. Since the motels were explicitly covered by the ordinance, this Court held that they had a live controversy against enforcement of the ordinance as to them, but it explicitly declined to adjudicate the question of the owners' standing to litigate on behalf of others, 493 US at 237: "It is not clear, however, whether they have prudential, *jus tertii* standing to challenge the ordinance on the ground that the ordinance infringes the associational rights of their motel patrons." The Court said nothing about loss of income establishing standing.

It is ironic that Respondent Attorneys should cite this case, since elsewhere in the decision the Court held that because none of the plaintiffs were subject to the civil disabilities the ordinance imposed, none of them had standing to challenge those provisions. *Id.*, at 232-235.

Respondent Attorneys also rely on *Caplin & Drysdale, supra*, 491 US 617, and *Craig v Boren, supra*, 491 US 617, but as explained in Petitioner Judges' brief, both of those cases involved statutes that directly affected the parties that were granted standing. Respondent Attorneys have cited no case where an attorney's mere hope or expectation of a fee from a potential future client who might be affected by a new statute was sufficient to establish third-party standing. Granting standing to Respondent Attorneys here would be a significant and unwise expansion of this Court's prudential standing doctrine.

C. Respondent Attorneys Do Not Have Sufficiently Close Relation To Unknown Potential Indigent Defendants.

None of the cases cited by Respondent Attorneys at pp 11-15 of their brief stands for the proposition that when the parties affected by a statute can bring their own challenge, attorneys who are not directly affected by the statute and who have no present clients nevertheless have standing to bring a facial constitutional challenge asserting the rights of potential future clients who might be subject to the statute. As explained in Petitioner Judges' brief, pp 17-24, all of the cases the Respondent Attorneys cite in which parties were held to have standing to assert the rights of others involved situations where the parties themselves were directly affected (*see, e.g., United States Department of Labor v Triplett*, 494 US 715 (1990) where an attorney faced State disciplinary sanctions); where the party had a present client who was directly affected (*see, e.g., Triplett, Caplin & Drysdale, supra* 491 US 617); or where there were "daunting barriers" to the ability of third parties to assert their own claims (*see, e.g., Powers, supra*, 499 US at 411). None of those circumstances is present here.

For example, Respondent Attorneys cite *Georgia v McCollum*, 505 US 42, 56 (1992) where the Court held that the State could assert the rights of potential jurors who had been excluded for racially discriminatory reasons. The State, of course, was a party to the criminal trial at issue, and as "the representative of all its citizens" was the "logical and proper party" to assert the rights of the excluded jurors who, like the jurors in *Powers v Ohio*, 499 US 400, 414 (1991)(discussed in Petitioner Judges' brief, p 23) faced "daunting barriers" to bringing suit themselves. In the present case the Respondent Attorneys are not parties to any underlying lawsuit, they are not logical or proper parties to assert hypothetical rights of

potential future clients, and there are no barriers to such future clients asserting their own rights.[1]

This Court should decline Respondent Attorneys' invitation to declare that attorneys have open-ended standing to bring facial constitutional challenges on behalf of unknown potential future clients who are free to assert their own rights.

D. There Are No Significant Obstacles To Future Indigent Criminal Defendants Asserting Their Own Rights.

When making the prudential determination whether an entity has standing to assert the rights of a third party, this Court has examined whether there is a hindrance to the third party's ability to protect his own interests. *Powers v Ohio, supra*, 499 US at 411. The Respondent Attorneys' arguments reveal that their true concern is not that future indigent defendants could not protect their own interests; rather it is that the normal process of litigation by affected parties would take too long and would not be successful.

Respondent Attorneys acknowledge that "the federal courts would abstain from hearing the challenge of any individual indigent denied appellate counsel," Brief, p 19, so such litigants would have to proceed in the Michigan courts and then

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[1] Respondent Attorneys' assertion at Brief, p 13, fn 3 and accompanying text, that they currently represent individuals subject to the challenged statute is an improper attempt to enhance the record. They chose to bring this facial challenge in the absence of clients who were directly affected by the statute, and it is now too late to change that strategy. In *FW/PBS v Dallas, supra*, 493 US at 235, this Court rejected a similar effort to enhance the record by a tardy affidavit and statements at oral argument: "We do not rely on the city's representations at argument as 'the necessary factual predicate may not be gleaned from the briefs and arguments themselves.' And we may not rely on the city's affidavit, because it is evidence first introduced to this Court and 'is not in the record of the proceedings below.'" (Internal citations omitted.)

the federal habeas corpus courts.[2] They also acknowledge, Brief, p 20, the precedential effect of *Bulger, supra*, 462 Mich 495. They decry the time such litigation would take, however, and assert that "if attorneys such as [themselves] cannot challenge this statute in federal court," there would be no "realistic prospect of federal judicial intervention." Brief, p 20.

There is no entitlement to "federal judicial intervention" in the normal State court process of litigating the validity of State statutes. Respondent Attorneys are merely dissatisfied that the normal course of litigation in the Michigan courts by real parties whose rights are at stake would not achieve the result these attorneys desire: swift declaratory and injunctive relief by a federal judge in a broad facial challenge to a State statute in the absence of any actual clients and any actual facts. In *Valley Forge Christian College v Americans United for Separation of Church & State*, 454 US 464, 489 (1982) this Court recognized that "'[the] assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.'" (Citation omitted.)

A critical element of the Court of Appeals' correct conclusion that the federal courts should abstain from hearing the claims of the indigent criminal defendant Respondents was

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[2] They assert that such a litigant would "have to coherently litigate the constitutional issue all the way through the Michigan appellate courts without the assistance of counsel." Brief, p 15. That is incorrect, of course, since the statute does not prohibit counsel, but only pertains to *appointed* counsel for an initial application for leave to appeal. If the application is granted and the merits of the claim are considered, the statute requires appointment of counsel. MCL 770.3a(2)(c). That is precisely what happened in the course of the litigation in *People v Bulger*, 462 Mich 495, 500-503; 614 NW 2d 103 (2000), *cert den* 531 US 994 (2000). Even when counsel is not appointed, the Michigan statute does not prohibit volunteer *pro bono* counsel from representing defendants and filing applications for leave to appeal. See Pet. App. 105a where the District Court discusses the 38-page "lawyerly brief" used by the indigent Resondents in their State court applications. See also, Brief for Respondent Kolenda, at 5; Brief for Amicus State of Iowa, et al, at 13, n 5.

the determination that they had adequate opportunity to raise their own constitutional claims in the Michigan courts. Pet App 9a-10a. In *Younger v Harris*, 401 US 37, 54 (1971) this Court discussed abstention principles and held that "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." That decision was based on the "longstanding public policy against federal court interference with state court proceedings," the principle that federal court injunctions against State court proceedings "are fundamentally at odds with the function of the federal courts in our constitutional plan," and the recognition that the broad responsibility of the federal courts "does not amount to an unlimited power to survey the statute books and pass judgment on laws before the [State] courts are called upon to enforce them." *Id*, at 42, 52.

Respondent Attorneys now concede that *Younger* principles prohibit claims by actual defendants, and admit that they joined the lawsuit precisely because they were not directly subject to *Younger*. Brief, at 18-19. Petitioner Judges submit that the mere fact that traditional principles of federalism and adjudication of actual cases and controversies prevents Respondent Attorneys from achieving their personal litigation goals is insufficient reason to distort well-recognized principles of standing and give attorneys without clients an open-ended right to bring facial challenges to State statutes.

II. There Is No Constitutional Right To Appointed Counsel In Discretionary Appeals From Guilty Plea Convictions.

Respondent Attorneys' position depends on an odd definition of "discretionary." To them a discretionary appeal means a "second-tier" appeal; the element of choice in deciding whether to grant an appeal is irrelevant. Brief, p 21. To Petitioner Judges, however, a discretionary appeal is one in which an appellate court has a choice whether to accept the appeal (initiated by an application for leave to appeal), as differentiated from appeals by right (initiated by a claim of appeal), which the appellate court must accept. Petitioner Judges' brief, p 29, n 20.

But the labels really do not control. It does not matter whether an appeal is called "direct," "first-tier," "second-tier," "discretionary," or "by right." The fact that the appeals in the present case are from guilty plea convictions rather than full trials is also not controlling. As explained in Petitioner Judges' brief, pp 30-34, a guilty plea represent "a break in the chain of events" that requires the defendant to give up many rights and that limits the number and complexity of issues that may be raised in an application for leave to appeal. Those factors are pertinent in determining the dispositive issue: whether an indigent defendant has "an adequate opportunity to present his claims fairly." *Ross v Moffitt*, 417 US at 616.

What matters for purposes of determining a right to appointed counsel is whether the appellate court decides the merits of the issues. *Douglas v California*, 372 US 353, 357 (1963)("where the *merits* of *the one and only appeal* an indigent has as of right are decided without benefit of counsel,

we think an unconstitutional line has been drawn between rich and poor." (First emphasis added.)[3] See also, *id.*, at 355-356 (discussing importance of the fact that in the system at issue, "the appellate court passes on the merits of his case" and that an attorney was necessary to provide a "real chance . . . of showing that his appeal has hidden merit.") That is because such an appeal is "an integral part of the . . . trial system for finally adjudicating the guilt or innocence of a defendant." *Griffin v Illinois*, 351 US 12, 18 (1956).

In contrast, the Constitution does not require appointed appellate counsel for an application for leave to appeal, particularly from a guilty plea conviction, to an intermediate State appellate court when the only question is whether the appellate court will exercise its discretion and accept the appeal. In such a system, "[t]he critical issue . . . is not whether there has been 'a correct adjudication of guilt' in every individual case." *Ross v Moffitt*, *supra*, 417 US at 615 (citing *Griffin*). To the contrary, the only question is whether the case should be granted plenary review.

In Michigan, applications for leave to appeal from guilty plea convictions are not appeals on the merits, and there is no constitutional right to appointed appellate counsel for such applications.

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[3] One of the amicus briefs supporting Respondent Attorneys (Brief of National Association of Criminal Defense Lawyers and National Association of Federal Defenders) argues that appeals are a "critical stage" of the proceedings at which counsel is constitutionally required. That argument was not made by Respondent Attorneys below or in this Court and was not decided below, so it is not properly before this Court. It is also contradicted by the text of US Const, Amend VI ("In all criminal prosecutions the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence"), is contrary to over 100 years of this Court's jurisprudence, *McKane v Durston*, 153 US 684 (1984), and is based entirely on the *Douglas* line of cases where an appellate court rules on the merits of the issues.

Once the fallacy of Respondent Attorneys' premise is recognized, their argument collapses and the authorities on which they rely are shown to be inapposite. For example, *Evitts v Lucey*, 469 US 387 (1985), *Coleman v Thompson*, 501 US 722 (1991), *Smith v Robbins*, 528 US 259 (2000), and *Swenson v Bosler*, 386 US 258 (1967) are all cases in which the Court concluded that under State procedures there was a right to appeal—as distinguished from a discretionary appeal as in the present case. Therefore the *Douglas* principle controlled rather than the *Ross v Moffitt* principle.

A. Michigan Court Of Appeals Orders Denying Applications For Leave To Appeal Are Not Decisions On The Merits Of The Legal Issues.

When the Michigan Court of Appeals denies an application for leave to appeal, it is deciding that it will not take the appeal. It is neither affirming nor reversing the judgment below. It is simply exercising its discretion whether to review the case on the merits.

Respondent Attorneys' entire argument is based on their mistaken premise that under Michigan procedures, an application for leave to appeal to the Court of Appeals is an appeal on the merits of the underlying substantive issues. Binding Michigan precedent, however, conclusively establishes that such applications are not appeals on the merits; they are requests that the Court of Appeals exercise its discretion and accept the appeal, in which the issues would *then* be decided on the merits. That binding precedent also conclusively establishes that orders denying discretionary applications for leave to appeal are not decisions on the merits.

Petitioner Judges' brief, pp 37-46, cites binding Michigan authority for the propositions that when acting on discretionary applications for leave to appeal, the Michigan Court of Appeals does not acquire plenary jurisdiction unless and until it grants

an application, and that orders denying applications for leave to appeal—for whatever reasons—are not decisions on the merits. *People v Tooson, (In re Withdrawal of Attorney),* 231 Mich App 504, 505-506; 231 NW 2d 504 (1998); *Great Lakes Realty Corp v Peters*, 336 Mich 325, 328-329; 57 NW 2d 901 (1953); *People v Berry*, 10 Mich App 469, 473-474; 157 NW 2d 310 (1968); *State ex rel Saginaw Prosecuting Attorney v Bobenal Invest, Inc,* 111 Mich App 16, 22 n 2; 314 NW 2d 512 (1981), *lv den,* 414 Mich 951 (1982).

Respondent Attorneys disparage these controlling published authorities as "old" without making any serious attempt to distinguish them or cast doubt on their validity. In particular, Respondent Attorneys refuse to acknowledge the reality that *Bobenal* involved orders using language that they rely heavily on in their arguments, *i.e.*, orders containing the language "IT IS FURTHER ORDERED that the application for leave appeal be, and the same is hereby DENIED for lack of merit in the grounds presented". As noted in Petitioner Judges' Brief, pp 41-42 and n 26, the official records of the Michigan Court of Appeals disclose that the orders in *Bobenal* used that precise language.

Instead, surprisingly, they continue to rely on three Michigan Court of Appeals decisions that do not even involve orders denying applications for leave to appeal and therefore have no bearing on the present case.[4]

[4] *People v Hayden*, 132 Mich App 273; 348 NW 2d 672 (1984) *People v Douglas*, 122 Mich App 526; 332 NW 2d 521 (1983) and *People v Wiley*, 112 Mich App 344; 315 NW 2d 540 (1981). As explained in Petitioner Judges' brief, p 42, those cases only involved the preclusive effect of orders denying defendants' motions to remand in the context of subsequent attempts to relitigate the same issues in the appeals on the merits. Those cases do not contradict the holdings of *Bobenal, supra,* and *Peters, supra.*

Even more surprising, they now cite four *unpublished* decisions of the Michigan Court of Appeals to support their arguments.[5] As Respondent Attorneys are well aware, Michigan law is absolutely clear that unpublished Michigan Court of Appeals decisions are binding only on the parties to that case, and have no precedential effect.

The controlling court rule is explicit, MCR 7.215(C)(1): "An unpublished opinion is not precedentially binding under the rule of stare decisis."[6] Additionally, case law is uniform in holding that unpublished opinions are not authoritative. *Southfield Police Officers Association v Southfield*, 433 Mich. 168, 202; 445 NW 2d 98 (1989)("It is indisputable that unpublished opinions of the Court of Appeals have no precedential value. [citing court rule]"); *People v Reid*, 233 Mich App 457, 474; 592 NW 2d 767 (1999)("absent the Supreme Court expressly adopting all or part of an unpublished opinion of this Court, it would be inappropriate to consider any part of such an unpublished opinion as substantively binding in an unrelated case"); *Ambs v Kalamazoo County Road Commission*, 255 Mich App 637, 642; 662 NW 2d 424 (2003)("Although defendants rely heavily on this case as support for their claim . . . , as an unpublished opinion . . . [it] is of neither precedential nor persuasive value on the issue presently before this Court. [citing court rule]").

In short, controlling Michigan authority holds that orders of the Michigan Court of Appeals denying discretionary

[5] *Contineri v Clark*, 2003 WL 21771236 (Mich Ct App 2003); *People v Weathers,* 2003 WL 21362810 (Mich Ct App 2003); *Sabaugh v Riga*, 2003 WL 21362981 (Mich Ct App 2003); and *DiCicco v City of Grosse Poine Woods*, 2002 WL 346126 (Mich Ct App 2002).

[6] Respondent Attorneys also have no answer to Petitioner Judges' arguments based on the nature and effect of "judgments" under MCR 7.215(E)(1). MCR 7.215(B), (C), and (E) are quoted in pertinent part at Petitioner Judges' Brief, pp 43-44, n 29 and related text.

applications for leave are not decisions on the merits. There is no precedential authority supporting Respondent Attorneys' arguments to the contrary.

Respondent Attorneys have abandoned their earlier reliance (see Brief Opp Pet at 7-8) on federal authority in the habeas corpus context, no doubt in recognition that *McKenzie v Smith*, 326 F 3d 721, 726-727 (6th Cir., 2003) considered and explicitly rejected such arguments. See Petitioner Judges' brief, pp 44-46.

For the reasons explained in Petitioner Judges' brief, since orders of the Michigan Court of Appeals denying applications for leave to appeal are not decisions on the merits, such applications are subject to the principle of *Ross v Moffitt*, 417 US 600 (1974) and not *Douglas v California*, 372 US 353 (1963). The constitution does not require appointed appellate counsel for such applications.

B. Defendants Who Plead Guilty Have Adequate Opportunity To Present Their Claims Fairly.

Respondent Attorneys contend, Brief, pp 38-39, that even indigent defendants convicted on guilty pleas can have complex issues, and that the process of applications for leave to appeal cannot result in a meaningful appeal without appointed counsel. Their argument is again based on their incorrect premise that a *pro se* defendant "would have to litigate" the merits of their issues. Under the Michigan procedures, the merits of the issues are not considered at the app'ication stage,

and under the statute, if an application is granted and the merits are considered, appellate counsel must be appointed. MCL 770.3a(2)(c).[7] Most appeals from plea-based convictions, however, involve some sort of challenge to sentencing, the Respondent Attorneys' argument ignores the fact that sentencing challenges require a timely objection at trial, when the defendant will have appointed trial counsel, or else they cannot be raised on appeal. MCL 769.34(10).[8] Since the indigent defendant will have the trial attorney's work product and a transcript of the proceedings, he will have all the necessary tools to complete the form provided by the State Court Administrative Office (Pet App 160a-170a) and present his claims fairly.

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[7] Respondent Attorneys' contention that guilty plea appeals have a considerable success rate is ill-founded. It is impossible to tell what the success rate of such appeals might be, because no official statistics exist. The Michigan Court of Appeals does not keep official statistics on reversal rates of any class of cases, including guilty plea appeals that have passed the threshold of an application for leave to appeal and are considered on the merits. Respondent Attorneys cite (Brief, p 40) a law student Note that refers to a Michigan House Legislative Analysis Section report (that is not an official record of legislative history) on a proposed constitutional amendment in 1994. That report refers to two self-serving communications received from appellate defender organizations giving their own widely disparate estimates of their success rate, but they can in no way be considered authoritative.

[8] MCL 769.34(10) provides:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

All convicted defendants also have available procedures for seeking post-appeal relief from convictions. MCR 7.501 *et seq*. This procedure permits review even of grounds that were not raised in direct appeal, including claims of ineffective assistance of counsel, if there is good cause for failing to raise them earlier, and actual prejudice. MCR 7.508(3). Counsel may be appointed in such proceedings and *must* be appointed if the trial court directs that oral argument or any evidentiary hearing be held. MCR 6.505(A).

As demonstrated in Petitioner Judges' brief, the Michigan procedures give defendants who plead guilty adequate opportunity to present their claims fairly and receive a meaningful appeal without appointed appellate counsel. That is all the Constitution requires.

CONCLUSION

For the foregoing reasons and those set forth in Petitioners' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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